United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1495

B
P/S

UNITED STATES OF AMERICA,

Respondents,

-against-

MICHAEL DeLUCA, et al

Appellant.

BRIEF FOR

MICHAEL DeLUCA

Respectfully submitted,

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Appellant.

PRELIMINARY STATEMENT

The appellant, Michael DeLuca, appeals from a conviction after jury trial of the crime of conspiracy in violation of Title 18 U.S.C., Section

This appeal will be limited to the issue of sufficiency of evidence.

The appellant was sentenced to a term of years. (Jacob B. Mishler, U.S.D.J.)

FACTS

The facts as they relate to appellant, Michael DeLuca, are simple, uncomplicated, and it is believed uncontradicted.

With the exception of several photographs taken in the vicinity of the Hy-Way lounge of appellant DeLuca, the only other direct testimony relating to him consists of his alleged participation in a conversation overheard in the Hy-Way lounge on May 11, 1973.

POINT I

MOTION FOR SEVERANCE SHOULD HAVE BEEN GRANTED.

After the conspiracy count was dismissed logic seems to dictate that the same result would follow since the remaining counts charged wholly unrelated crimes. The majority decision of the Supreme Court in Schaffer v. United States, 362 U.S. 511, 80 S. Ct. 945 (1960), disagrees and therefore this point is raised merely to preserve it if a further appeal is necessary.

The Supreme Court's holdings in Schaffer, however, forms the basis of the contention that a severance should have been granted under Rule 14 of the Federal Rules of Criminal Procedure. While holding that dismissal of a conspiracy count does not, as a matter of law, make joinder of unrelated substantive counts improper, the Supreme Court stated at 362 U.S. 511, 516, 80 S. Ct. 945, 948, that:

> "We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possiblity of such prejudice."

Although the Courts in Schaffer that a Rule 14 severance was not required under their facts, the facts there seem to be clearly distinguishable from the ones herein. In Schaffer, the

conspiracy count was dismissed by the court for "failure of proof". 362, U.S. 511, 513. Here, the conspiracy count was dismissed under Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946) and United States v. Bertolotte, 529 F2d 149 (2d Cir., 1975) on the grounds that since government proved two or three conspiracies under an indictment charging a single conspiracy there was a variance, which was so prejudicial as to require dismissal. It is submitted that the same prejudice which required the Court below to dismiss the conspiracy count required it to grant a severance a new separate trials under Rule 14 Fed. R. Crim. Pro.

Moreover, unlike the facts herein, the petitioners in Schaffer "not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial" 362 U.S. at 516, 80 S. Ct. at 948.

Other factors which distinguish our case from those in Schaffer follow:

A. Schaffer involved four defendants and over a two week trial while our case involved 20 defendants and over a six week trial.

B. In Schaffer virtually every offer of proof, testimony or exhibit was followed by an instruction that the proof admitted with respect to one defendant was not to be considered with respect to any other defendant while in our case, with few exceptions, all proof was admitted with the admonition that it was being taken subject to connection on the conspiracy count.

C. Unlike Schaffer, the witnesses in this case were not called in orderly fashion but rather were called and then recalled on numerous occasions so as to lump all defendants together.

D. A claim was made in the case at bar that the conspiracy count was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial. (TR 5641-5642) At the time the superceding indictment was drafted the government knew that there were three "legs" to the conspiracy. One of the "legs" involved a violation of New Jersey law and the government charged only a violation of New York law in the conspiracy count. In addition, the government knew that its expert could not, with certainty, tie the remaining two "legs" to a single conspiracy.

The only evidence introduced by the government against appellant, DeLuca, to support count five, the only count in which they were named after the conspiracy count was dismissed, in a trial that lasted over six weeks, was the defendant's alleged conversation intercepted at the Hy-Way Lounge on May 11, 1973.

The physical evidence clearly showed a large scale policy operation involving millions of dollars. The government contended from its opening statement through its summation that the Napolis were the heads of this operation. On many occasions during the interception at apartment 309 the Napolis were implicated by statements made by other defendants. For example, on one occasion Anthony Di Matteo while obviously referring to his employment in the policy business says "Nobody's my boss but Jimmy Nap". (T. 3247)

While it is true that the court instructed the jury both at the end of the government's case and in his charge that the tapes intercepted in April and May at the HiWay were the only evidence they should consider in determing count five, we submit that it was impossible for the jury to do so. This is especially true in light of the emphasis placed on the other evidence in the governments summation.

It is submitted that DeLuca was severly prejudiced by the wealth of evidence introduced to prove the substantive count he was not indicted for as well as a conspiracy, which the prosecutor knew prior to trial could not be connected to a single conspiracy. That evidence, mostly hearsay statements and policy work seized from others, would not have been admissible against DeLuca at a separate trial and was highly prejudicial. Moreover, the prejudice was compounded by the prosecutors summation on that evidence.

As this court said in U.S. v. Branken, 395 F2d. 881, 888, 889, (2 Cir., 1968):

> "Apart from the prejudice inherent in any mass trial, a defendant in a trial, a defendant in a trial in which the conspiracy count has been dismissed is likely to be prejudiced in defending the charges in the substantive counts by evidence, particularly hearysay testimony, which was admissible on the conspiracy count but which could not have been used against him in a separate trial on the most dramatic of the many examples of this in the record before us in Cooper's statement to Neely that he needed money because he was in the policy business with Charles Moore.

Courts have recognized the grave danger of this kind of prejudice and have required "impregnable" safeguards to protect against it. See Blumenthal v. United States, 332 U.S. 539, 559-560, 68 S. Ct. 248, 92 L. Ed 154 (1947). In the present case the trial judge instructed the jury to consider as to any defendant only (1) documentary evidence relating to that defendant, (2) testimony as to acts of that defendant, and (3) conversations either with that defendant or in his presence. However, he permitted the hearsay statements of a co-defendant principal to be considered against a defendant charged with aiding and abetting on the question of whether the defendant had aided and abetted. He made no attempt to itemize the evidence which had been stricken. The difficulty with this approach is that it leaves to the jury the task of mastering these abstract principles and applying them to the vast amount of evidence introduced at trial. We accept the submission that the alternative of spending hours or even days telling the jury precisely what it is supposed to forget is not demonstrably superior to the method followed by the trial judge. In our view the risk of prejudice to the taxpayer defendants by reason of the joinder was so great that "no amount of cautionary instructions should have undone the harm." United States v. Kelly, 349 F.2d 720, 758, (2d Cir., 1965), cert. denied, 384 U.S. 947 (2d Cir., 1958)

It is regrettable that the trial court had to confront substantial motions for severances after five weeks of trial. Since the testimony of Mrs. Neely provided no surprises, counsel for the government must surely have known in advance of trial that the chances of proving the conspiracy charged in the indictment were very slim. Yet the conspiracy count provided the only justification for the joinder of the eight defendants. If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper

> in the midst of trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors. See United States v. Agueci, 310 F.2d 812, 840-841, 99 A.L.R. 2d 478 (2d Cir., 1962), cert. denied, 372 U.S. 959, 83 S. Ct. 1016, 10 L. Ed 2d 12 (1963); Panel Discussion, The Problems of Long Criminal Trials, 34 F.R.D. 155, 158-161 (1963) (statement of Judge Weinfeld)."

We further submit that the courts charge could not cure the prejudice created by the joint trial. As this court said in United States v. Wolfson, 427, F.2d 862, 869-870 (2d Cir., 1970):

> "Merely to instruct the jury at the end of the case and in the charge to disregard four weeks of proof directed to stock fraud was probably an exercise in futility exemplified by Kruelwitch v. United States, 336 U.S. 440, 69 S. Ct. 716 and Delli Paoli v. United States, 352 U.S. 232 77 S. Ct. 294 and finally resolved realistically by Burton v. United States, 391 U.S. 123 88 S. Ct. 1620. In short no matter what instructions were given, it is more than doubtful that the minds of the jury could be wiped as clean as a blackboard or slate. Even had the court earlier in the trial by the strongest instructions told the jury that the stock purchase fraud and four weeks of testimony thereon were to be expunged from their minds, this court would doubt (along with Mr. Justice Jackson and others) that such mental gymnastics would be possible. Whether instructions timely given would have enabled the jury to deliberate on the real question ultimately posed by the court - - - an appellate court will never know, but our developed concpets of a fair trial call for serious of the likelihood of prejudice."

The question presented is not whether the jury reached the right result or whether the record supports the conviction absent the evidence which would not have been admissible against the defendant. It is rather what effect the inadmissible evidence had, or reasonably may be taken to have had upon the jury's decision. This court should judge that question not necessarily by the way this court would react but rather with allowance for how a reasonable jury might react to such evidence. If the evidence had substantial influence upon the verdict or if one is in grave doubt as to whether the evidence had substantial influence. the conviction cannot stand. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946)

Even if this court concludes that the inadmissible evidence did not have substantial influence, this court should reverse the conviction on the ground that the conspiracy count was not alleged by the government on good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial. In United States v. Acken, 373 F.2d 294 (2d Cir., 1966) this court said:

> "Where joinder was originally proper under Fed. R. Crim. Pro. 8(b) - - - a motion for severance after the count justifying joinder (here the conspiracy count) is dismissed, will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the government in good faith, that is, with reasonable expectation that sufficient proof would be forthcoming at trial."

Accordingly, this court should reverse the conviction and order a severance and separate trial.

POINT II

FAILURE TO NAME APPELLANT DeLUCA IN ORDERS DATED APRIL 12, 1973 AND MAY 3, 1973 REQUIRE SUPPRESSION.

In addition to other constitutional objections related to illegal interception orders raised and adopted by co-appellants, appellant DeLuca specifically objects to orders dated April 12, 1973 and May 3, 1973 relating to Hy-Way lounge on ground that he was not named in said orders although his conversations were recorded.

Although no conversations of his were recorded as a result of the April 12, 1973 order his voice was alleged to have been overheard and recorded on May 3, 1973 pursuant to Order dated May 3, 1973. It is this conversation upon which the government that his guilt has been established.

Appellant contends that the FBI had knowledge which led them to conclude that appellant DeLuca was a major figure in the instant gambling operation since prior to November, 1972. In his affidavit dated January 18, 1973, Special Agent Parsons reported conversations he believed related to DeLuca. At this time he was requesting authorization to install a pen register to obtain additional evidence relating to DeLuca.

That thereafter in his affidavit dated February 20, 1973, Parsons again related his belief that DeLuca was a major figure in this matter and that co-defendant Mascitti was his stepson and that he (DeLuca) resided at 21-06 Hoyt Avenue, Astoria, Queens. In addition, this affidavit mentioned the Hy-Way lounge as a place where the agent believed that gambling activity was discussed. This affidavit led to further application to intercept conversations at the Hy-Way lounge itself.

In an affidavit supporting the Order dated April 12, 1973, for the Hy-Way lounge interception, agent Parsons stated as follows:

> A. There is probable cause for belief that .... also known as ....; ..... also known as .... and .... ; ..... also known as .... and ...; ..... also known as ....; Michael DeLuca also known as Mikey, Jr., ... also known as ....; and others as yet unknown have committed, and are committing, will continue to commit and will continue to conspire to commit offenses involving the conducting, financing, managing, supervisin, directing or owning of all or part of an illegal gambling business in violation of Article 225, Section 225.0 through 255.40, of the New York State Revised Penal Law, and also in violation of Sections 1955 and 371, of Title 18, United States Code.

In addition on page 11 of said affidavit the agent stated that his informant indicated that DeLuca was a "... money handler and trouble shooter for Napoli..." and a ... supervisor of bank workers..." Further that he would attend "sit-downs" at the Hy-Way lounge and other places at least twice a week. Parsons further stated that his own

Where sufficiency is the issue, each case must be examined on it's own facts. U.S. v. Baum, 482 F.2d 325.

In this case the most that can be said for appellant DeLuca, is that he was present at the Hy-Way lounge and participated in a conversation on May 11, 1973. The photographs with respect to his presence at the Hy-Way lounge are at best inconclusive. There was no other direct or circumstantial evidence to establish appellant, DeLuca, participated in the crime alleged herein.

It has been held, that mere presence of the appellant is not sufficient to sustain conviction on substantive or conspiracy counts where there is no evidence that he exercised dominion or control over the articles in question. United States v. Vilhotti, 452 F.2d, 1186 (1971). The rule has been stated as follows:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted or participated in the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator. Pinkney v. United States, 380 F.2d 882, (5th Cir., 1967); United States v. Garguilo, 310 F.2"9 (1962)

observations of DeLuca over many years and on November 20, 1972 bore out his informants information. However, DeLuca was not named in the April 12, 1973 Order.

In his affidavit, A.U.S.A. Fred Barlow, in support of the May 3, 1973 Order related many allegations regarding appellant DeLuca and the Hy-Way lounge. Again, Agent Parsons in his supporting affidavit for said Order, re-stated his original allegations and knowledge of DeLuca. However, appellant was not named in the Order of May 3, 1973.

As can be seen from the various affidavits regarding the interception Orders in this case, the FBI had sufficient knowledge regarding DeLuca to name him in the Order of both April 12, 1973 and May 3, 1973, as required by Title III of the Omnibus Crime Control and Safe Street Act.

Said Act requires the naming of persons in the application and interception Order when law enforcement authorities have probable cause to believe a person is committing an offense. A reading of the applications herein would, if true, seem to establish probable cause as to DeLuca. He therefore, should have been named in the Hy-Way lounge orders. The failure to do so requires suppression. (U.S.A. v. Kahn, 94 S. Ct. 977; 415 U.S. 143; U.S.A. v. Capra, 501 F.2d 267; 18 U.S.C.A. 2518, 2518 (1)(c), (3) (c).

POINT III

EVIDENCE WAS INSUFFICIENT TO SUSTAIN CONVICTION.

As stated in summary of facts, evidence of DeLuca consisted of allegation that he was a participant in a May 11, 1973 conversation. There was speculation but no evidence for contention that appellant was the "Mikey, Jr.", referred to in "309" conversation.

Agent's testimony relating to voice identification was not conclusive at the Hy-Way lounge on May 11, 1973.

He was observed on one occasion entering the home of co-appellant Mascitti's mother.

It was contended, but not one scintilla of evidence supported Government's theory that DeLuca was Mascitti's father or that he was the "Mikey, Jr.", mentioned in the "309" conversations.

The only evidence to support the Government's contention that DeLuca participated in the May 11, 1973 conversation consisted of Agent Leegangs. Said agent was not certain of voice when first heard. He based his opinion to DeLuca's voice when he spoke to him briefly while serving subpoena on him at a restaurant. There was also a voice exemplar of appellant. Said exemplar was played at jury's request several times during deliberation.

It is felt herein, that with respect to the conduct of DeLuca, the matter should not have been submitted to the jury and motion to dismiss should have been granted. The association of guilty men may create suspicion, but it is not evidence of sufficient weight to convict. United States v. Carengelia, C. A. Ill. 1952, 198 F.2d 3.

POINT IV

ADOPTION

Appellant herein adopts each and every argument and point of law of his co-appellants herein insofar as it affects his interests.

CONCLUSION

JUDGMENT OF CONVICTION SHOULD BE REVERSED AND INDICTMENT DISMISSED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondents,

-against-

MICHAEL DeLUCA,

Defendant.

----------X

AFFIDAVIT OF SERVICE

76-1495

STATE OF NEW YORK)
) SS:
COUNTY OF KINGS)

ROSA A. MORALES, being duly sworn deposes and says:

Deponent is not a party to this action, and is over 18 years of age and resides in Brooklyn, New York.

That on February 4, 1977, deponent served the within Brief upon Michael E. Moore, Esq., attorney for Respondents in this action, at c/o T. George Gilinsky, Esq., P.O. Box 899, Ben Franklin Station, Washington, D. C. 20044, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of NewYork.

Rosa A. Morales
ROSA A. MORALES

Sworn to before me this 4th
day of February, 1977.

Peter J. Fabricant

PETER J. FABRICANT
Notary Public, State of New York
No. 24-4007301
Qualified in Kings County
Commission Expires March 30, 1977